# *The Existence of Rules*

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In this paper I have the limited purpose of considering the question of the relationship between, on the one hand, there being a rule, or one's having a rule, and, on the other hand, it being the case that one does something as a rule. In the formal mode, it is a question about the relationship between statements made in sentence forms such as:

a) 1. There is a rule that . . .
   2. I make it a rule to . . .
   3. We have a rule that . . .

and statements made in sentence forms such as:

b) 1. They do . . . , as a rule
   2. As a rule, I . . . .

About b) 1. and 2. nothing much needs to be said. Statements of this form are clearly empirical statements, and they are clearly general statements. That is the force, in both cases, of 'as a rule'. Clearly too, they contextually imply, whether or not they logically imply, that there are counter-instances, that 'as a rule' could be replaced without a change in truth-value by 'usually' but not by 'always'. The question whether or not 'as a rule' logically implies counter-instances is the question whether, e.g. 'As a rule, I shave before breakfast' and 'I always shave before breakfast' are or are not logically contrary to each other—on the assumption, of course, that 'I always shave before breakfast' logically implies that I never do not shave before breakfast. Some people would want to say that it did not. In that case 'As a rule I . . . .' and 'I always . . . .' would not necessarily be contraries. It would all

depend on whether 'as a rule' was to be interpreted as saying something more than 'usually'; and whether 'always' was to be interpreted as saying something more than 'almost never not'. These questions are not relevant to my topic, and so I do not pursue them. But what they turn on is, and that is why I have mentioned them. All I want to say here about statements of the form b) is that they are empirical, general statements, that they would be misleading, if not false, if their user did not believe them to have counter-instances; and finally—something that I have not so far mentioned—that their counter-instances are "exceptions", but not breaches, violations, or instances of disobedience. If Jones as a rule shaves before breakfast but (1) did not last Sunday, because he had a terrible hang-over, (2) did not on Tuesday because he had run out of razor blades, (3) did not this morning, because he wanted to show his wife that he was not a slave of routine, then these are the exceptional cases—not, of course, exceptions *to* 'Jones as a rule shaves before breakfast' but exceptions allowed for *under* it, and so strictly they are not really even exceptions, for there is nothing for them to be exceptions to. A case of Jones not shaving before breakfast may be exceptional enough for his wife to comment on it, but it is not an exception—save to 'Jones shaves before breakfast', which is not the statement that was made. And a case of Jones not shaving before breakfast is not, if all that can in this respect truly be said of him is that as a rule he shaves before breakfast, a breach or a violation of anything, even if it is so rare an occurrence and so shocking to his wife for her anthropomorphically to regard it as a breach or a violation of some sort.

Statements of the form a) are less easy. If we take 1., we can see that it does not tell us *where* there is a rule that . . . , i.e. we have to distinguish between the case of "them" having a rule that, and "us" having a rule that. 'They have a rule that . . .', being a statement made about a community by somebody looking in from the outside, pretty clearly is an empirical statement, even if it is not so clear what it is a statement about. It is not a statement *about* the conduct of the people concerned, even if it is true, as some suppose, that for it to be true that they have a rule that . . . , it must be true that on the whole (as a rule) their conduct conforms to it, in the minimum sense of not breaking it. That 'they have a rule that . . .' is not a statement about their conduct in the way in which 'as a rule they . . .' is, is clear

from the fact that establishing what their rule was from observing what their conduct was would be a process of indirect verification—whereas establishing that they as a rule . . . from observing what their conduct was would be a process of direct, even if inductive, verification. The more direct way of finding out what is the rule that they have will be by looking it up in the right place, consulting a lawyer, asking a policeman, etc.

'We have a rule that . . .' differs from 'They have a rule that . . .' in an important way such that even where the people referred to by the 'we' and the 'they' are the same the statements are different. There are plenty of cases where, if two people want to say the same thing, one has to use 'we' and the other 'they'. But *this* is a case where perhaps they *cannot* say the same thing (and there are plenty of these cases too, e.g. the use of performatives), and where, even if they can say the same thing, they cannot do it just by using 'we' and 'they' respectively. 'We' does more here than serve to indicate that I belong to the community which has the rule. It does indicate that, and at least to that extent the statement is empirical. But it also indicates my acceptance of the rule; this is the significance of being on the inside, instead of being on the outside looking in, as they are. If I have to tell students what 'infer' means, and that it does not mean the same as 'imply', I am calling their attention to a linguistic rule which we have in English, and my statement of the rule is both descriptive and normative—normative for me, and for anybody else (including them) who wishes to use English words "correctly". The rules which we have, whether in using our language, playing golf, entering into commercial contracts, or whatever, are norms for the guidance and regulation of conduct. Practices (which are the subject of description) can become norms (which are the subject of prescription) and frequently do, but they thereby become transformed, and thereafter provide standards or criteria of decision and criticism. Rules of language are of just this kind, practices become norms. If, during the course of a game, I ask what is the rule governing the situation in which I am, I am asking to be told what it is that I *may/must* now do. (Kelsen distinguishes between rules and norms, saying that the former are descriptive statements about the latter. While the distinction which he is making is unexceptionable and is well enough indicated by the words used in the original German, viz. *Rechtssatz* and *Rechtsnorm* respectively, the word which he uses

in English as a translation of the former, viz. 'rule', is most ill chosen. It obscures the distinction which he is making, between a rule and a statement of a rule, and it has the consequence that a rule has a truth value, which, by correct English usage, it does not. We regard rules as things which we can make, break, obey, disobey, violate, repeal, etc. You cannot, on the other hand, obey or disobey a description. And, if, for example, the British ever get around to changing the rule of the road in their country from driving on the left to driving on the right, they will not be changing a description—although a lot of descriptions will have to be changed.)

What I have said of 'We have a rule that . . .' is even more conspicuously true of 'I have a rule that . . .' (or 'I make it a rule to . . .'). Where I have a rule that . . . , I am my own legislator. And if I claimed that I had a rule that I always answered letters on the day on which I receive them, but that I did not *accept* it as a rule/norm, I would be guilty of absurdity. If I have a rule always to answer letters on the day of receipt, and if one day I do not answer them because I am too lazy or forgetful, then answering them is not just something which I have not done, it is something which I have failed to do. Correspondingly the 'we' in 'we have a rule that . . .' is the 'we' of identification and of acceptance. (I am not saying that there are *no* exceptions to this, and that a man could not say "We have a rule that . . . but I don't accept it". But that he is a rebel, and consciously a rebel, shows that his case is a deviant from the normal force of 'we' in 'we have a rule that . . .').

Next, statements of form a) do not appear to imply anything about exceptions. About b) 1. and 2. I said that (contextually, at least) they do imply them: the statement that people/I as a rule do a certain thing certainly says that they/I usually do it and certainly suggests that sometimes they/I do not do it. But that they/I have a rule that appears to leave it quite open whether they/I sometimes/never act otherwise than in accordance with it. Professor Hart, in *The Concept of Law*, seems to think it is not quite open at the other end—that it does imply that at least they/I usually do it. I shall come back to this, for it is a central issue in a discussion of rules. I simply say for the present that, as against Hart, there is no *prima facie* contradiction in saying that they have a certain rule, but they usually or even always break it. And this extends to 'we', more doubtfully

to 'I'. I do not think for example that many motorists in this country would find any difficulty in saying that we have a 30 m.p.h. speed limit in built-up areas but that practically none of us takes any notice of it. If there *is* no contradiction in "They have a rule that . . . but they seldom/never observe it", this is the beginning of a wedge to drive between it and "They, as a rule, do . . . but they seldom/never do it", which clearly does contain a contradiction. What I have said so far is in line with what Professor Kemp said in his review of Hart's *Concept of Law* (*Philosophical Quarterly* April 1963). When I come back to this topic I shall, to some extent, depart from this line; for I think Kemp has oversimplified as much in one direction as Hart may have done in the other. What Kemp says is formally true, but misleading: for it is not the case that with regard to absolutely any rule at all is an open question whether people accept or keep it.

If within a community there is a rule that . . . , conduct within the community which is not in accordance with it is not just an exception, but a breach or violation. The man who acts differently from the way specified in the rule is not just acting differently from others (he may not even be doing that, for they too may act differently from the way specified in the rule), he is breaking or disobeying the rule. He may be doing it knowingly or unknowingly. The fact that he knowingly breaks the rule renders him liable to criticism and, if it is a legal rule, to prosecution and conviction; this is not true of mere divergence from practice. If a man unknowingly breaks a rule (e.g. borrowing McNaghten terminology, knowing the nature and quality of his act, but not knowing that it was wrong), he may in some cases still be liable to criticism, e.g. if it is treated as a case of strict liability type, or as a case in which he ought to have known, in which his ignorance was due to negligence. If not, he is excused—but it still *is* a matter of being excused, not just of being classified as different.

The distinction between their having a rule that . . . and 'they as a rule . . . .' matters, because of the thesis that for there to be a rule in a given community the rule must in some sense be "accepted", which for some writers amounts to their being in the habit of keeping it. If this thesis is to be maintained, and if a habitual performance is needed for there to be a rule, then it must be habitual obedience (of some kind). It would not be

sufficient that they should be in the habit of doing x, where it is also as a matter of fact true that the performance of x is required by a rule. It could be true both that people were in the habit of doing x and that there was a rule requiring the doing of x, while at the same time the people were totally unaware that there was such a rule. In that situation they could not be said to accept the rule, even although their habitual performance was in accordance with it. So, even if habitual performance were a necessary condition of acceptance, it would not be a sufficient condition. Acceptance involves some kind of attitude to the rule. As I have already indicated, I am not sure that 'there is a rule that . . .' or 'they have a rule that . . .' entails anything at all about habits, but, if it does, then it is habits of obedient performance, not just habits of performance. By 'habits of obedient performance' I do not mean anything Kantian or even semi-Kantian: I do not mean that they are in the habit of performing x out of respect for the rule requiring x, nor even that each performance is accompanied by the thought that it is the rule. What I do mean is habitual performance of x by people who have whatever attitude to the rule is involved in their accepting it. Of course, it is true that if their having a rule that x . . . does entail habits of obedient performance (and I am not saying that it does), then it entails habits of performance. Consequently, on this thesis that having a rule entails habitual obedience, 'they have a rule that . . .' would entail 'they as a rule do . . .'. And that the thesis does have this latter entailment is what makes the thesis seem to be implausible. The interesting thing which seems to be involved in the acceptance of a rule is not so much the habit of obedience as the attitude to non-obedience.

So we have the question whether having a rule that . . . involves acceptance; and the question whether acceptance involves habitual obedience. It seems to me that, if the questions are put simply and generally like that, the answer to each is No. Some distinctions need to be made, after which we get still some answers No, but other answers Yes. Hart does not, I suspect, make the necessary distinctions, and makes the consequent mistake of answering Yes to the two questions. Kemp, in his review of *The Concept of Law* also failed to make the distinctions, and went too far the other way. What I shall argue is that whether 'there is a rule that . . .' entails 'they, as a rule, do . . .' depends on what the rule happens to be; or, more accurately, that some rules

that . . . do entail it, while others do not. Not all rules have the same status. Hart seems to think that that there is a rule entails habitual conformity. "To say that at a given time there is a rule requiring judges to accept as law Acts of Parliament or Acts of Congress entails first, that there is general compliance with this requirement and that deviation or repudiation on the part of individual judges is rare; secondly, that when or if it occurs it is or would be treated by a preponderant majority as a subject of serious criticism and as wrong, even though the result of the consequent decision in a particular case cannot, because of the rule as to the finality of decisions, be counteracted except by legislation which concedes its validity though not its correctness. It is logically possible that human beings might break all their promises: at first, perhaps with the sense that this was the wrong thing to do, and then with no such sense. Then the rule which makes it obligatory to keep promises would cease to exist; this would, however, be a poor support for the view that no such rule exists at present and that promises are not really binding." (*Concept of Law,* pp. 142–3)

This, I think, is altogether too crude. It all depends what kind of a rule we are talking about. We cannot generalize about rules, without blurring the distinction 1) between rules of law and rules of custom or social rules 2) within rules of law a distinction corresponding to that made in 1)

1) *Rules of law.* That there is a rule (legal rule) that . . . entails nothing whatever about what people within its jurisdiction actually do. What they do will be determined by a great variety of factors: how much the rule harmonises with or conflicts with their interests; how easy or difficult breaches of the rule are to detect; how efficient the law enforcement officials are; how concerned they are to enforce the rule, and so on. From the fact alone that there is a rule that . . . you can infer nothing whatever about what people do. You need to know either the value of particular variables of the kind I have mentioned, or the value of some more comprehensive variable, such as their attitude towards keeping laws whatever they may be. Examples: the number of people who fail to make honest tax returns of income which they receive in the form of *cash* is obviously enormous; I suspect that few people possessing taperecorders, and also knowing the provisions of the Copyright Act, bother to keep to the provisions, because they know the chances of detection are small; in some places the

general idleness and inefficiency of the police in respect of minor law-breaking are such that few people bother to keep within the law, e.g., of illuminating parking lights on vehicles left in the street during darkness. And the 30 m.p.h. rule is such that practically nobody anywhere nowadays keeps to it, and practically nobody anywhere nowadays is prosecuted for failing to keep to it—not, this time, because police forces throughout the country are idle or incompetent, but because they know very well that a strict enforcement of the rule would make urban traffic congestion worse than it already is.

In fact, in the case of rules of law, it is clearly necessary to distinguish between a rule's validity and either its effectiveness or its applicability (which are different again from each other). In the case of a law its existence and its validity are the same thing. But such a law will serve little purpose, either if it is not or if it cannot be effectively employed; or again, if it cannot be applied, e.g. obsolete laws which cannot be applied because the conditions of applicability no longer obtain. But a rule of law does not become invalid or void because it becomes useless. I quote a passage from Dennis Lloyd's *The Idea of Law* (p. 97), which is interesting on several counts:

i) he *seems* unclear whether he is talking about Law (with a capital L, meaning a system of law) or about an individual law

ii) he *seems* to agree with Hart that a necessary condition of a law's existence is some measure of observance of it

iii) he clearly disagrees with Hart over the position of moral rules. "Law, however, differs from moral norms in this further respect that it calls for a certain measure of regularity of observance, for without this feature it would hardly be entitled to rank as law at all. A moral rule on the other hand may still be held to be valid even if it is never or scarcely ever observed."

i) The first sentence there suggests that he is talking about Law: and in that case, what he says might be right. But the second sentence, which is intended to contrast with the first, speaks of "a moral rule" and therefore suggests that by 'law' in the first sentence he means 'a law'; in which case what he says in that sentence seems plainly wrong—if what he says in that sentence itself is plain at all.

ii) What he says is that, without some "measure of regularity of observance . . . it would hardly be entitled to rank as law at all."

This caginess invites the retort "Well does it? or doesn't it?" At any rate he does seem to be tying validity of a law closely to observance (or effectiveness)—although a few lines later he has some doubts, where he says that law "raises rather special problems as to the circumstances in which we would regard an individual law as binding [N.B. he is explicitly referring to an "individual law"], where it has become totally disregarded with the passage of time". The question whether a law ceases to exist or loses its validity through continued non-observance cannot be given a general answer. It can only be answered by reference to the municipal system to which the law belongs: in a system, such as that of Scotland, which recognizes *desuetude* even statutes can be regarded as repealed in this way. But few other systems now incorporate the principle of desuetude, and of these some would be less ready than others to secure the conviction of ban-the-bomb agitators under long disused mediaeval statutes.

iii) When Lloyd says that moral norms do not require for validity or existence that they should be observed, he is in disagreement with what, e.g. Hart said about promises in the passage from *The Concept of Law*. And here I should agree with Lloyd and disagree with Hart. To repeat what Hart said, "it is logically possible that human beings might break all their promises: at first, perhaps with the sense that this was the wrong thing to do, and then with no such sense. Then the rule which makes it obligatory to keep promises would cease to exist." But it would not: it would be ineffective during the period while people were still making promises (which in fact they were going to break), and while other people were acting on them i.e., were taking the promises at their face value; it would be inapplicable when the stage had been reached when, because nobody put any trust in anybody's promises any more, nobody actually made promises any more (for it would no longer be worthwhile). But the obligation to keep promises does not vanish or cease to be valid in circumstances in which nobody makes promises. It would still be true that, if anybody made a promise, he would be under an obligation to keep it. A conditional proposition does not become false, if its conditional clause is not fulfilled. If it did, bookmakers might make more money out of cancelled race meetings than out of those that are held, and the fallacy of denying the antecedent would not *be* a fallacy.

*Social rules.* Here existence does entail some degree of observance. We would not say that we had a social rule requiring people to do x, if in fact very few people did x, and if in fact failure to do x incurred very little social criticism. For example, very few men nowadays offer their seat on a bus or on an underground train to a woman; and the number of those who think it impolite or rude of men not to do so or who even notice it is, I suspect, now very small. There certainly was such a social rule not many years ago. It was not merely that men did it: they had as small boys been taught by their mothers to do it; and failures to do it then both incurred criticism and were thought to be justifiably criticised. It does seem absurd to say that we do have such a social rule still, although it is hardly ever observed, and although non-observance seldom incurs, or is thought to deserve, criticism. The important thing here to the continued existence of a social rule is less the continued observance of it, than the continued attitude to observance or non-observance. Clearly the two are connected, and the influence of observance and attitude on each other is reciprocal. But a social rule is a rule to the extent that it has the authority of society behind it. And this is the germ of what is common to social rules and the legal rules I was speaking of before—that a rule exists if it has the support of authority. In the case of a legal rule, the authority is the legislature, judiciary and the law-enforcement officials. If a statute has been enacted in the correct manner by the legislature, and if when a case falling under it is brought for adjudication it is adjudicated in accordance with it, and if the sentence is properly executed, then that rule is there. It makes no difference that there are no actual prosecutions and adjudications under it—as long as, if there were, the adjudications would be in accordance with it. This is only the beginning of the story of what it is for a legal rule to exist; I do not intend here to pursue the question how far one can diminish the authority of a legal rule before it ceases to be one. But it *is* the beginning; and the authority behind a legal rule which makes it true that that rule exists or is valid is quite independent of the rule's being generally observed or not. In the case of social rules that is not so. Even there the important thing is acceptance rather than observance. With a social rule what gives it its authority is its acceptance. With a legal rule, whether or not *we* accept it makes no difference: it is still a rule as long as it has been properly made and will or would be properly applied.

2) *Distinction with Rules of Law.* Within the whole class of what I have so far called legal rules (to contrast them with social rules) there is a distinction corresponding to the one I have been making. Consequently, strictly what I have said about legal rules should be taken to be said only of one sub-class of legal rules. The contrast is that between i) statute-rules of law and ii) custom-rules of law

i) Statute-rules. What I have hitherto said of legal rules should now be taken as restricted to them. Every legal system is likely to include them, although in a common law system such as the English system they are less numerous and less powerful than in a civil law system such as those on the continent of Europe and in Scotland deriving from Roman law. This is going to raise some problems for Britain when they go into the Common Market, if they do: they are so used to having their rules of law made up by their courts rather than by their Parliament that their legal system is going to have some trouble adjusting itself to the opposite system. In the long run, it is likely to be an improvement, for politicians are less conservative than judges.

ii) A great deal of English law consists of customs that have acquired legal status, without being enacted by Parliament at all. How they acquire it is a complicated but not here relevant question. One way, of course, is by adjudication, but it is not the only way: the proposition that there are no custom-rules of law that have not been given legal status by adjudication is certainly false. For a custom to become law it must be like a social rule—i.e. it must be a general practice within its context, and be a generally accepted practice within its context. And if it is to become law by adjudication, the court must find not only that it is a custom, but also that it is a reasonable custom. It needs to meet some (if not all) of a great many other conditions, including the length of time that it has existed. The best length of time for these purposes if "from time immemorial"; and time immemorial in English law began in 1189. However, the important thing is that for a custom to be law it must *be* a custom: it must at the time exist, and have for some time continuously existed: "if it is proved not to exist, it is necessarily declared not to be law and to have no validity" (C. K. Allen, *Law in the Making*, 6th ed. p. 147)

In English law, and in the absence of a written constitution, many of the second order rules of law are of this custom-kind. By

'second order rules of law' I here mean rules prescribing how those concerned with making or administering the law are to do their job. E.g. "To say that at a given time there is a rule requiring judges to accept as law Acts of Parliament or Acts of Congress entails . . . that there is general compliance with this requirement and that deviation or repudiation on the part of individual judges is rare," (Hart, *The Concept of Law*, p. 142): this entailment would hold only if the rule were a custom-rule. Strictly speaking, Hart is still wrong. 'There is a rule requiring judges to accept as law Acts of Parliament' does not *entail* 'Judges generally comply with this requirement.' The rule requiring judges to accept as law Acts of Parliament *does* involve their general compliance with it—for the rule *happens* to be a custom-rule. But it might not have been. It might have been a statute-rule. In that case, it might have been true both that there was a rule and that judges did not generally comply with it. Consequently it follows that 'there is a rule requiring judges . . .' does *not* entail 'judges generally comply with it. . . .' If Hart had been more careful and had said that the rule requiring judges to accept as law Acts of Parliament involves that they generally comply with it, he would have been all right. Similarly for their constitutional customs, e.g. the sovereignty of Parliament, much of its procedure, rules concerning the constitutional position of the monarchy, the authority of courts to develop the law by judicial interpretation (cf. Lloyd, *Idea of Law*, p. 247). Others have not yet quite acquired legal status, although maybe they will; e.g. the custom of a Prime Minister resigning if defeated in the Commons on a major issue, or of the monarch's accepting the advice of an outgoing Prime Minister whom to invite to form a government. One final example of a second order rule of law which is a custom-rule and which is interesting concerns the rule of precedent. Until 1966, in English law any court was bound by its own precedent decisions unless they had been overthrown by a higher court. This had as a consequence that the House of Lords could not reverse its previous decisions. In American law, which was not only founded on but still closely adheres to English law, there is the same general principle that the decision of a higher court is binding on a lower court (with some flexibility in practice), but the Supreme Court does review and frequently depart from its previous decisions. The effect of the difference could be seen in the functioning of the two systems: the American has the advantage of escaping the arthritic rigidity

of the English system, and the disadvantage of the danger of subordinating judicial to political considerations; and in consequence the Prime Minister's power of appointing bishops of the Church of England is not nearly as alarming as the U.S. President's power of appointing justices of the Supreme Court.

I conclude that the question about a rule, where that rule is a law, "Does it exist only if it is observed?" does not admit of a single answer. For statute-law the answer is No, for custom-law the answer is Yes. Custom-laws are therefore something like social rules, but they are also different from them in a way which makes them something like statutes. They are like social rules in that to exist they must both be observed and be accepted. They differ, in that the acceptance of social rules is by society at large, while the acceptance of custom-law is not: it is acceptance by the courts and by lawyers, i.e. practising members of the profession and legal authors in their articles and books. In general a law exists if it belongs to a system of law by whatever rules for that system constitute belonging. In the English case the latter rules reduce themselves broadly to 1. rules of procedure in the case of statutes 2. rules of legal acceptance in the case of customs.

But then what are we to say about these second order rules themselves, and the system to which they belong? What constitutes their existence and/or validity? The answer would be easy if one of the Natural Law theses were acceptable, but none is. For the Legal Positivist the answer is far from easy. The main complaint I have against Hart's *Concept of Law* is that he refuses at this fence, or rather that he denies that this fence is on the course. It is something to have given up looking for the authority of law in the commands, or wishes, or will of a sovereign; and it is something to have suggested that it is to be found in the concept of rules: but that is not the end of the story. The concept of a rule needs to be explored; and we need to provide an answer to the question when does a rule (of law) exist? The division of rules of law into primary and secondary, or substantial and adjectival, or rules of obligation and rules of recognition is a good one, for it does reflect a real difference between kinds of rule in a legal system. Of a rule of requirement it may do to say that it exists, or *is* a rule of the legal system concerned, if and only if it meets the criteria of the rule(s) of recognition. It may be that substantial rules of law derive their authority from the system's rules of recognition—but what about those rules, and indeed the system

itself? At some point or other we have to face a fact which is well enough known to politicians, but is so distasteful to philosophers that they prefer to pretend it is not there—viz. that in the end the question of authority is the question of success. The activities of insurrectionary bodies, and their putative legislation are illegal —until they win. This is well illustrated by the U.D.I. in Rhodesia. The British government regards the activities of the Smith regime as illegal—and so indeed they are, for as long as there is any practical chance of bringing it down; as long as there is the chance, or there is a reasonable plausibility about saying that there is a chance, the British government has to remember to avoid referring to the Smith regime as a government, and to refer to them instead as rebels. But if, in the end Smith is successful and his legislation is effective then it is not "legislation" any more, it is legislation.[1] A legal system, or the second order rules determining the validity of the first order rules, are valid if they work—they have authority if the people affected, or enough of them, acknowledge their authority; and acknowledging their authority is not the same as approving of it. It is the same as not challenging it, the reasons for which may be various, with approval as only one of them. A rule of law must, to exist, be operable, and it is not operable if people will not stand for it.[2] The 30 m.p.h. law is operable: we take vir-

[1] The interest of the ruling given on 9 September 1966 by the Rhodesian High Court that the Smith government was both illegal and at the same time the only effective administration in the country at that date, and that consequently public policy required the court "on the basis of necessity and in order to avoid chaos and a vacuum in the law [to] give effect to such measures of the effective government, both legislative and administrative, as could lawfully have been taken by the lawful government under the 1961 constitution for the preservation of peace and good government and the maintenance of law and order", lies in the good sense (if not the total consistency) shown by the court when required to operate within the embarrassing phase of a revolution when the traditional principles of logic fail to apply: it is neither true nor false that the insurrectionary regime is the government. The court's good sense consisted in its recognition of the need in such a situation to give pre-eminence to public policy; that being so, some inconsistency was shown in the implication that the court would not give effect to any measures which could not have been taken by the lawful government under the 1961 constitution, even if it were true that the taking of them were required by public policy.

[2] By 'operable' I mean: can be operated, or is workable. Operability is wider in its scope than enforceability. If a law is enforceable, it is operable. But a law might be operable, even though it were not enforceable, e.g. if the people, or enough of them falling within its jurisdiction were sufficiently rational and enlightened to be prepared to make their conduct conform to the requirements of the law, even although there was no legal provision for

tually no notice of it, but we stand for it, we do not refuse to pay our fines if convicted. But a rule of law making all forms of industrial strike action illegal would certainly not in this country be operable: even if the bill got through Congress (and the Supreme Court) attempts by the police and the courts to enforce it would lead to such resistance and defiance that some change would have to follow, such as a change in rules of recognition. I am not saying that such a rule of law is never operable, only that it is not now—in different economic circumstances such as those of the late 1920's and early 1930's maybe it would have been.

What is right (or rather, almost right) about a sovereignty-type theory of law (such as those of Hobbes and Austin) is its insistence on enforceability as a necessary condition of law. What is wrong about such a theory is its seeing enforceability in terms of the power and effectiveness of a sovereign's will. The existence of law at all is the reflection of a recognized need for orderliness and for the social utility of freedom to plan. The rule of law, and law as a system of rules, exists as what can be seen to make for the orderliness which we want, and to regulate and foster social utility by competition (the conflict of interests) within an overall context of cooperation (convergence of interests). The natural law theorist must say that whether or not a secondary rule exists or is a law is a question about its extra-legal moral or theological backing: and this view seems plainly wrong, for it confuses the question whether or not the rule exists with the question whether or not it is a good thing that it should. The Kelsen-type positivist must say that to ask *what* the secondary rules of a given system are is legitimate, but to ask *whether* they exist, or whether they are valid is to run off the end of the line: the secondary rules have to be taken as the axioms and definitions of the system. Their validity is presupposed. The Hart variant is that about *them* questions of validity cannot arise. If you want to construct a different system with a different set, you may; but seriously to ask for their

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their enforcement, and they knew it. It is generally supposed that enforceability is a necessary condition of a law's existence, and consequently that "international law", in the almost complete absence of enforceability, fails to be law. If, as I suggest, operability rather than enforceability is what is necessary to a law's existence, the question whether "international law" fails to be law is not settled by the absence of enforceability. Where conditions permit it, as in a municipal system, the most effective way of making a law operable is to make it enforceable. Where conditions do not permit it, as in the present state of international affairs, that is not so.

credentials of validity is to show that you do not know an absurd question when you see one. I do not find this kind of positivism satisfactory either. No doubt for any given set of secondary rules any other set could in principle be substituted. And about the set that we have there is nothing much to be said beyond that it is the set we do have. But there is this much—that pragmatically it works and is acceptable: it provides a way of making, interpreting, adjudicating on, amending, repealing and enforcing a set of laws which, to a greater or lesser degree, make coherent sense as a set of laws. The important difference between a rule and a command is that about a rule there is a presumption that it is sensible, while about a command there is no such presumption. A rule is normally made in relation to a social purpose, to specify, foster, control or delimit the purpose, and to produce orderliness in the relevant activities: on a small and tidy scale, the rules of games provide a simple and clear instance. The need for rules, including secondary rules, would be unchallenged by any society in which any of us would be likely to want to live.

A secondary rule, or set of such rules, will be valid as long as it actually is used, and is used successfully—if the people who could make trouble by not going along with it do go along with it. Doubts about "international law" whether it really is law often rest on the non-existence of or doubtful effectiveness of enforcement agencies. But, as already suggested, this is to misplace the doubts. They should rest rather on uncertainty about the extent to which nations accept the rules for settling legal disputes and making international law. One way of getting them to accept them is to *make* them accept them, i.e. by enforcement agencies. But it is not the only way, and consequently the existence or effectiveness of such agencies is not necessary to the existence of international law. It is a mistake to confuse operability with the existence or effectiveness of enforcement agencies. A law is operable to the extent that there is no risk of successful defiance to it. One way, but not the only way, of achieving this end is to have an effective enforcement agency, to secure the failure of defiance. Another way is to have no risk of defiance, as, for example, where the party concerned has sufficient respect for the authority concerned, or for the rule of law, or for the weight of adverse opinion. Acceptance of authority, susceptibility to moral pressure (which are quite different from giving way through fear or from considerations of prudence) are important factors contributing to

operability, even where an enforcement agency either does not exist or is too feeble to be effective. Indeed, the degree to which the existence and efficiency of such an agency itself depend on these factors tends to be underrated. Hitherto, where the UN have tried to use enforcement agencies (and nothing else), they have not been conspicuously successful; but the rule that conduct is legally in order if it is authorized by the UN Security Council has been reasonably successful. The rule is beginning to work, as illustrated by the manner of the British interception in the summer of 1966 of the tanker *Manuela,* which was trying to run a cargo of oil to the port of Beira for supply to Rhodesia, when Britain was pursuing the policy of cutting off Rhodesia's oil supply. The example that Britain displayed of getting Security Council backing *before* intercepting the tanker, despite the difficulties that were placed in the way of getting that backing, and despite the ease with which the tanker could have been intercepted without it, was both a valuable acceptance of the rule and a valuable contribution towards it. If to make a legal system valid if it works sounds to be contravening the principle that an 'ought' cannot be derived from an 'is', that need not worry us; it is quite time that it was contravened.